Rozilawati bt Hj Basir v Nationwide Express Holdings Bhd & Ors

HIGH COURT (KUALA LUMPUR) — WRIT NO WA-22NCC-361–08 OF 2018
ONG CHEE KWAN JC
18 AUGUST 2020

Companies and Corporations — Meeting — Board of directors meeting — Whether there was legal requirement that the notice of board of directors' meeting must contain particulars or sufficient particulars of the matters to be discussed at the board of directors' meeting — Whether the first defendant's board of directors' meeting was valid and properly convened with the first defendant's constitution — Whether the plaintiff could not have participated in any deliberations or cast any vote in her capacity as first defendant's director pertaining to her termination — Whether the resolution passed in the board meeting which form the subject matter of this suit was valid

Companies and Corporations — Relief — Whether plaintiff entitled to claim for relief of reinstatement as the managing director — Whether the plaintiff was entitled to seek a non-party to this suit for the purported wrongful termination

This case dealt with the validity of a board of directors' meeting of a company. The main issue examined was whether, as a matter of law, there was a need for matters to be discussed at the meeting to be notified in advance to the directors. The plaintiff was the duly appointed managing director ('MD') of the first defendant. The second to the fifth defendants were directors of the first defendant. On or about 27 April 2018, the plaintiff received a notice of board of directors' meeting ('the notice') to be held on 30 May 2018 ('the BOD meeting'). It is not in dispute that the agenda for the BOD meeting ('the agenda') and the 'discussion papers' mentioned in the notice ('the discussion papers') were only forwarded to the plaintiff on or about 21 May 2018. On 30 May 2018, during and/or immediately after the deliberation of item 5 of the agenda at the BOD meeting, the third defendant as the chairperson announced that the plaintiff's position as the managing director was to be terminated forthwith. There was no objection from any of the directors present at the BOD meeting. The plaintiff however walked out of the BOD meeting in protest. A Bursa announcement was made on 30 May 2018 on the said termination under the heading of 'change in boardroom'. On or about 3 June 2018, the plaintiff received the plaintiff's termination notice dated 30 May 2018. On or about 12 June 2018, one Indraa Izwaan Mohd Yusof ('Indraa') who was at the material times the chief operating officer ('COO') of the first

defendant also received the COO's termination notice dated 30 May 2018. The plaintiff had come to know subsequent to the BOD meeting that the board of directors had also passed a resolution at the BOD meeting terminating Indraa's service as the COO of the first defendant. On 17 August 2018, the plaintiff commenced the present action. The first issue determined by the court concerned on whether there was a legal requirement that the notice of board of directors' meeting must contain particulars or sufficient particulars of the matters to be discussed at the board of directors' meeting. It was also on the plaintiff's contention that there was non-participation by the plaintiff as a director to deliberate and vote on the termination of her contract of service as managing director and the termination of Indraa as the COO at the board meeting. The plaintiff contended that the resolutions passed at the meeting were invalid. The plaintiff further claimed for the relief of reinstatement of her position as the managing director of the company and for Indraa to be reinstated as the COO of the first defendant was premised upon the validity of the notice, the BOD meeting and the resolutions carried thereto.

Held, dismissing the plaintiff's claim with costs of RM20,000:

(1) The court was of the opinion that the requirement that the notice specifying the business to be transacted with some sufficiency was at best a matter of best practice but as a matter of law, it was not the case that the notice was required to state the matters or particulars of the business to be discussed at the meeting unless expressly required in the company's constitution. There was no legal requirement for the notice to include an agenda of the matters to be discussed at the meeting that such agenda for the meeting should be dispensed with. Paragraph 4 of the Third Schedule of the Companies Act 2016 provided that a notice of a meeting of the board shall include the matters to be discussed. Although the company was at liberty not to adopt the Third Schedule or any of the rules therein, it nevertheless reflected the legislative's intent that such practice should be the default provision whenever the Third Schedule was adopted. The constitution of the first defendant did not mandate that the notice of directors' meeting shall include the matters to be discussed. Accordingly, the common law position as enunciated in *Dr Mahesan* applying *Compagnie de Mayville* was applicable (see paras 34 & 44–45).

(2) It was not necessary that there must be deliberation of the subject matter by the board of directors before a resolution relating to the matter can be validly carried through. There was no necessity for a formal voting process to take place before a resolution is validly carried through. The plaintiff had taken the decision to walk out of the meeting when the matter relating to the termination of her contract of service was raised by the Chairman. The plaintiff could not complain that the resolution pertaining to Indraa's contract of service was invalid because of her non-participation, which was a result from her own doing. It also did not

lie in her mouth for the plaintiff to contend that she was not aware that Indraa's contract of service would be discussed after she left the meeting. When the plaintiff opted to walk out of the meeting, she did so at her own perils and could not be permitted to challenge any resolutions that may be proposed and passed after she left (see paras 50 & 54).

(3) The plaintiff was entitled to claim that in the event the notice and or the BOD meeting and or the resolutions thereto were found to be invalid and or declared to be null and void, the consequences flowing from the same must necessarily meant that both the plaintiff and Indraa would be re-instated as the managing director and the COO of the first defendant respectively. The court agreed that the declarations for the re-instatements had nothing to do with the claims for wrongful dismissal which were more appropriately pursued in the Industrial Court under the Industrial Relations Act 1967. Only the plaintiff and not Indraa who had the necessary locus standi to seek for the declaration that Indraa be re-instated as the COO of the first defendant on the basis that the notice, BOD meeting and the resolutions were invalid (see paras 58–60).

[Bahasa Malaysia summary

Kes ini berkaitan dengan kesahihan mesyuarat lembaga pengarah syarikat. Isu utama yang dikemukakan adalah sama ada, dari segi perundangan, terdapat keperluan agar perkara-perkara yang akan dibincangkan dalam mesyuarat tersebut dimaklumkan terlebih dahulu kepada pengarah-pengarah. Plaintif adalah pengarah urusan ('MD') yang dilantik oleh defendan pertama. Defendan kedua hingga kelima adalah pengarah defendan pertama. Pada atau kira-kira 27 April 2018, plaintif telah menerima notis mesyuarat lembaga pengarah ('notis') yang akan diadakan pada 30 Mei 2018 ('mesyuarat ALP'). Adalah tidak dipertikaikan bahawa agenda mesyuarat ALP ('agenda') dan 'discussion papers' yang disebutkan dalam notis ('discussion papers') hanya dikemukakan kepada plaintif pada atau sekitar 21 Mei 2018. Pada 30 Mei 2018, semasa dan/atau sejurus pertimbangan perkara 5 agenda dalam mesyuarat ALP, defendan ketiga sebagai pengerusi mengumumkan bahawa kedudukan plaintif sebagai pengarah urusan akan diberhentikan serta merta. Tiada bantahan dari mana-mana pengarah yang hadir dalam mesyuarat ALP. Plaintif bagaimanapun keluar dari mesyuarat ALP sebagai protes. Pengumuman Bursa dibuat pada 30 Mei 2018 mengenai pemberhentian tersebut di bawah tajuk 'change in boardroom'. Pada atau kira-kira 3 Jun 2018, plaintif telah menerima notis penamatan plaintif bertarikh 30 Mei 2018. Pada atau kira-kira 12 Jun2018, Indraa Izwaan Mohd Yusof ('Indraa') yang berada pada waktu material sebagai ketua pegawai operasi ('COO') defendan pertama juga menerima notis pemberhentian COO bertarikh 30 Mei 2018. Plaintif telah mengetahui selepas mesyuarat ALP bahawa ahli lembaga pengarah juga telah meluluskan resolusi pada mesyuarat ALP yang menamatkan perkhidmatan Indraa sebagai COO defendan pertama. Pada 17 Ogos 2018,

plaintif memulakan tindakan ini. Isu pertama yang ditentukan oleh mahkamah berkenaan mengenai sama ada terdapat syarat perundangan bahawa notis mesyuarat ahli lembaga pengarah perlu mengandungi butir-butir atau butir-butir yang cukup mengenai perkara-perkara yang akan dibincangkan dalam mesyuarat lembaga pengarah. Selain itu, pihak plaintif berpendapat bahawa tiada penyertaan oleh pihak plaintif sebagai pengarah untuk membincangkan dan memutuskan pemutusan kontrak perkhidmatannya sebagai pengarah urusan dan penamatan Indraa sebagai COO dalam mesyuarat ahli lembaga pengarah. Plaintif berpendapat bahawa resolusi yang dikeluarkan dalam mesyuarat itu adalah tidak sah. Plaintif selanjutnya menuntut relif untuk jawatannya sebagai pengarah urusan syarikat dikembalikan dan jawatan Indraa dikembalikan sebagai COO defendan pertama berdasarkan pada kesahihan notis tersebut, mesyuarat ALP dan resolusi yang dibuat.

Diputuskan, menolak tuntutan plantif dengan kos sebanyak RM20,000:

(1) Tiada keperluan untuk menyatakan perbincangan perkara oleh lembaga pengarah sebelum satu resolusi yang berkaitan dengan perkara tersebut dapat diputuskan secara sah. Tiada keperluan untuk proses pengundian secara formal sebelum satu resolusi diputuskan secara sah. Plaintif telah mengambil keputusan untuk keluar dari mesyuarat itu apabila perkara yang berkaitan dengan penamatan kontrak perkhidmatannya dibangkitkan oleh Pengerusi. Plaintif tidak boleh mengadu bahawa resolusi yang berkaitan dengan kontrak perkhidmatan Indraa tidak sah kerana dia tidak ikut serta, akibat hasil dari perbuatannya sendiri. Tidak disangkal bagi plaintif untuk mengatakan bahawa dia tidak menyedari bahawa kontrak perkhidmatan Indraa akan dibincangkan setelah dia meninggalkan mesyuarat. Ketika plaintif memilih untuk keluar dari mesyuarat itu, dia melakukannya dengan memberikan kesan terhadap diri sendiri dan tidak diizinkan untuk mencabar sebarang resolusi yang mungkin diusulkan dan disahkan setelah dia keluar (lihat perenggan 50 & 54).

(2) Mahkamah berpendapat bahawa syarat notis yang mengandungi perniagaan yang akan ditransaksikan dengan beberapa informasi yang cukup adalah praktik terbaik tetapi dari segi perundangan, notis itu tidak diperlukan untuk menyatakan perkara atau butir-butir perniagaan yang akan dibincangkan dalam mesyuarat itu melainkan jika dikehendaki secara jelas dalam perlembagaan syarikat. Tiada syarat perundangan untuk notis itu mengandungi agenda dari hal-hal yang akan dibahas dalam mesyuarat tersebut sehingga agenda mesyuarat tersebut harus dibatalkan. Perenggan 4 dari Jadual Ketiga Akta Syarikat 2016 memperuntukkan bahawa notis mengenai mesyuarat ahli lembaga pengarah harus merangkumi perkara-perkara yang akan dibincangkan. Walaupun syarikat tersebut bebas untuk tidak menggunakan Jadual

Ketiga atau peraturan apa pun di dalamnya, namun ini mencerminkan niat perundangan bahawa praktik tersebut harus menjadi peruntukan *default* setiap kali Jadual Ketiga diguna pakai. Perlembagaan defendan pertama tidak memerintahkan bahawa notis mesyuarat pengarah merangkumi perkara-perkara yang akan dibincangkan. Oleh yang demikian, kedudukan *common law* seperti yang dinyatakan dalam *Dr Mahesan* yang menerapkan *Compagnie de Mayville* diguna pakai (lihat perenggan 34 & 44–45).

(3) Plaintif berhak untuk menuntut bahawa sekiranya pemberitahuan dan atau mesyuarat ALP dan atau resolusi dinyatakan tidak sah dan atau dinyatakan batal, akibat yang timbul dari perkara-perkara tersebut semestinya bererti kedua-duanya plaintif dan Indraa masing-masing akan ditugaskan semula sebagai pengarah urusan dan COO defendan pertama. Mahkamah bersetuju bahawa pengisytiharan untuk dimasukkan semula itu tidak ada kaitan dengan tuntutan pemecatan yang salah dan lebih tepat ia diadili di Mahkamah Perusahaan di bawah Akta Perhubungan Perusahaan 1967. Hanya plaintif dan bukan Indraa yang mempunyai lokus yang diperlukan untuk meminta pengisytiharan bahawa Indraa dimasukkan semula sebagai COO defendan pertama dengan alasan bahawa notis, mesyuarat ALP dan resolusi tidak sah (lihat perenggan 58–60).]

Cases referred to

Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal [1995] 2 MLJ 770; [1995] 3 CLJ 639, CA (refd)
Dr Mahesan & Ors v Ponnusamy & Ors [1994] 3 MLJ 312, HC (folld)
Eastern Resources of Australia Ltd v Glass Reinforced Products (GRP) Pty Ltd & Ors (1986) 10 ACLR 496, SC (refd)
Henderson v Bank of Australasia (1890) 45 Ch D 330, CA (distd)
La Compagnie de Mayville v Whitley [1896] 1 Ch 788, CA (folld)
Lee Nyuk Heng & Anor v Pembangunan Ladang Hassan Sdn Bhd & Others [2002] MLJU 684; [2003] 8 CLJ 237, HC (refd)
Primus (M) Sdn Bhd v EON Capital Bhd [2011] 9 MLJ 828, HC (refd)
Young v Ladies Imperial Club Ltd [1920] 2 KB 523; [1920] All ER Rep 223, CA (refd)

Legislation referred to

Companies Act 2016 Third Schedule, para 4
Industrial Relations Act 1967
Rules of Court 2012 O 14A

Alan Wong (Nurul Azureen with him) (Zain Megat & Murad) for the plaintiff.
Idza Hajar Ahmad Idzam (SY Lee, Yong Li Sa and PY Leong with her) (Zul Rafique & Partners) for the defendants.

Ong Chee Kwan JC:

[1] This judgment deals with the validity of a board of directors' meeting of a company. The main issue examined is whether, as a matter of law, there is a need for matters to be discussed at the meeting to be notified in advance to the directors.

BACKGROUND FACTS

[2] At all material times, the plaintiff was the duly appointed managing director ('MD') of the first defendant. The second to the fifth defendants are directors of the first defendant.

[3] On or about 27 April 2018, the plaintiff received a notice of board of directors' meeting ('the notice') to be held on 30 May 2018 ('the BOD meeting'). It is not in dispute that the agenda for the BOD meeting ('the agenda') and the 'discussion papers' mentioned in the notice ('the discussion papers') were only forwarded to the plaintiff on or about 21 May 2018.

[4] The agenda for the BOD meeting stated as follow:

> NOTICE IS HEREBY GIVEN THAT the 6th Meeting of the Board of Directors of the Company will be held on Wednesday, 30th May 2018 at 9.30am at the Board Room, Nationwide Express Holdings Berhad, Lot 11A, Persiaran Selangor, Section 15, 40200 Shah Alam, Selangor Darul Ehsan.
>
> AGENDA
>
> 1. To confirm the following minutes of the Board of Directors meeting:
>
> (a) Minutes of the 5th Board of Directors meeting of the Company held on 27th February 2018;
>
> (b) Minutes of the Special Board of Directors meeting of the Company held on 30th March 2018; and
>
> (c) Minutes of the Special Board of Directors meeting of the Company held on the 20th April 2018.
>
> 2. To receive the following minutes of the Audit Committee meeting:
>
> (a) The minutes of the 5th Audit Committee meeting of the Company held on 20th February 2018;
>
> (b) The minutes of the Special Audit Committee meeting of the Company held on 14th March 2018; and
>
> (c) The minutes of the Special Audit Committee meeting of the Company held on 20th May 2018.
>
> 3. To confirm the minutes of the Extraordinary General meeting held on 17th May 2018.

4. To receive Matters Arising.

5. To approve the announcement of the financial results to Bursa Malaysia Securities Berhad in respect of the 4th Quarter of FY 2017/2018 ended 31st March 2018.

6. To receive the Group Performance and the Management Progress Report for the period ended 31st March 2018.

7. To transact any other matters.

BY ORDER OF THE BOARD

... (signed) ...

FATTIADRIATI BINTI MOHD TAREH (LS 0009849)

Company Secretary

[5] On 30 May 2018, during and or immediately after the deliberation of item 5 of the agenda at the BOD meeting, the third defendant (as the chairperson) announced that the plaintiff's position as the MD was to be terminated forthwith. There was no objection from any of the directors present at the BOD meeting. The plaintiff however walked out of the BOD meeting in protest.

[6] A Bursa announcement was made on 30 May 2018 on the said termination under the heading of 'change in boardroom'.

[7] On or about 3 June 2018, the plaintiff received the plaintiff's termination notice dated 30 May 2018.

[8] On or about 12 June 2018, one Indraa Izwaan Mohd Yusof ('Indraa') who was at the material times the chief operating officer ('COO') of the first defendant also received the COO's termination notice dated 30 May 2018.

[9] The plaintiff had come to know subsequent to the BOD meeting that the board of directors had also passed a resolution at the BOD meeting terminating Indraa's service as the COO of the first defendant.

[10] On 17 August 2018, the plaintiff commenced this action.

[11] On 24 August 2018, the first defendant's annual general meeting ('AGM') was convened. The plaintiff was not re-elected as a director of the first defendant.

THE PLAINTIFF'S CASE

[12] The plaintiff's primary complaints are that:

(a) the termination of contract of service of the plaintiff and/or Indraa were not part of the agenda of the BOD meeting; and

(b) there was no deliberation by the directors before the purported resolution to terminate the plaintiff as the managing director of the first defendant.

[13] Accordingly, the plaintiff challenged the validity and/or regularity of the BOD meeting and the resolutions passed thereto.

[14] The reliefs sought by the plaintiff against the defendants as stated in the writ and statement of claim filed are, inter alia, as follows:

(a) a declaration that the first defendant's board meeting held on 30 May 2018 is wrongfully convened, ineffective, invalid, null and/or void;

(b) a declaration that the resolution passed in the board meeting in relation to the plaintiff's position as the managing director of the first defendant as well as Indraa's position as the COO is wrongful, ineffective, invalid, null and/or void;

(c) a declaration that the plaintiff's termination notice and Indraa's termination notice are wrongful, ineffective, invalid, null and/or void;

(d) a declaration that the plaintiff remains rightfully the managing director of the first defendant, lawfully elected and that she has not vacated her office;

(e) an injunction order to restrain and prevent the second defendant, third defendant, fourth defendant and fifth defendant, whether by themselves, their servants, their agents or otherwise howsoever wrongfully preventing the plaintiff from discharging her duties as the managing director of the first defendant in any manner whatsoever;

(f) an injunction order to restrain and prevent the second defendant, third defendant, fourth defendant and fifth defendant from whether by themselves, their servants, their agents or otherwise howsoever excluding the plaintiff (be it constructively or physically) from any board meeting of the first defendant in any manner whatsoever; and

(g) an injunction order to compel the second defendant, third defendant, fourth defendant and fifth defendant, whether by themselves, their servants, their agents or otherwise to retract the company announcement on 30 May 2018.

A PRELIMINARY QUESTIONS OR ISSUES OF LAW

[15] By encl 45, the defendants moved this court to determine the following questions or issues of law under O 14A of the Rules of Court 2012 ('the rules'):

B Question 1: Whether the defendants were correct in that at the material time, there was no mandatory requirement under the first defendant's articles of association dated 27 April 2016 ('constitution') and/or applicable laws to have all matters/particulars to be discussed (including but not limited to the plaintiff's proposed termination as first defendant's managing director) to be C set out in the notice of meeting dated 27 April 2018 and/or meeting agenda dated 21 May 2018?

Question 2: Whether the first defendant's board of directors' meeting held on 30 May 2018 was valid and properly convened in accordance with the first D defendant's constitution?

Question 3: Whether the defendants were correct in that the plaintiff could not have participated in any deliberations or cast any vote in her capacity as the first defendant's director (as she then was) pertaining to her termination as the first defendant's managing director in light of article 91 of the first defendant's E constitution?

Question 4: Whether the resolutions passed in the board meeting which form the subject matter of this suit are valid?

F Question 5: Whether the plaintiff's claims for an order for reinstatement of the plaintiff's position as the first defendant's managing director are reliefs confined and under the exclusive purview and jurisdiction of the Industrial Court pursuant to the Industrial Relations Act 1967?

G Question 6: Whether the plaintiff is entitled to seek for reliefs for Indraa who is a non-party to this suit for the purported wrongful termination of his contract of service as the first defendant's COO?

(collectively referred as 'the preliminary issues')

H **[16]** On 24 February 2020, this court granted an order in terms of the plaintiff's application for the preliminary issues to be heard under encl 45 upon the plaintiff conceding that for the purpose of the preliminary issues, the same will proceed on the basis that there was no deliberation and or formal voting process by the board of directors in respect of its decision to terminate the I plaintiff's contract of service as the managing director of the first defendant.

COURT'S DECISION ON THE PRELIMINARY ISSUES

[17] Given the commonality of issues inherent in the questions 1 and 2, questions 3 and 4 and questions 5 and 6 respectively, they shall be taken together in turn.

QUESTIONS 1 AND 2

[18] Questions 1 and 2 deal with the question regarding the sufficiency of the notice to the plaintiff on the matters to be discussed at the BOD meeting. In particular, it requires the determination by the court as to whether there is a legal requirement that the notice of board of directors' meeting must contain particulars or sufficient particulars of the matters to be discussed at the board of directors' meeting. In the context of the present case, whether the notice must provide sufficient notice to the plaintiff that termination of her contract of service as the managing director of the first defendant would be discussed at the BOD meeting and the effect of such omission, if any, on the validity of the BOD meeting.

[19] Article 86 of the constitution of the first defendant provides:

> The Directors may meet together for the despatch of business adjourned and otherwise regulate their meetings as they think fit. A director may at any time and the secretary shall on the requisition of a Director summon a meeting of the Directors by giving them not less than seven (7) days' notice thereof unless such requirements waived by them.

[20] As can be seen, article 86 deals only with the need for the notice of the directors' meeting to be given not less than seven days from the date of the intended meeting. There is no dispute that the notice in this case was given not less than seven days from the board of directors' meeting held on 30 May 2018.

[21] Article 86 is silent on the need for the matters or particulars to be discussed at the meeting to be set out in the notice. Indeed, learned counsel for the plaintiff conceded that the constitution does not contain any articles requiring that the matters or particulars to be discussed at the directors' meetings to be stated in the notice.

[22] Learned counsel for the plaintiff however relied on the English decision of *Henderson v Bank of Australasia* (1890) 45 Ch D 330 to support his contention that the notice must contain sufficient details or particulars to inform the directors of the matters or business to be deliberated and transacted at the directors' meeting, more specifically to include in the agenda the matter on the potential termination of the plaintiff's contract of service as the

managing director and the potential termination of Indraa as the COO of the first defendant.

[23] In *Henderson v Bank of Australasia* (1890) 45 Ch D 330, the court held as follows:

> [T]he notice which specifies the business to be done, or objects of the meeting is to be fair notice, intelligible to the mind of ordinary men, the class of men who are shareholders in the company and to whom it is addressed. The court does not scrutinize these notices with a view to exercise criticisms, or to find out defects, but it looks at them fairly. I think the question may be put in this form: what is the meaning which this notice would fairly carry to ordinary minds? That, I think, is a reasonable test.

[24] The aforesaid case was cited by our High Court in *Primus (M) Sdn Bhd v EON Capital Bhd* [2011] 9 MLJ 828.

[25] Reference was also made to the following passage by Gopal Sri Ram JCA (as he then was) in *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770; [1995] 3 CLJ 639 where His Lordship stated thus:

> Whilst particular cases may be distinguished upon their special facts, I take the proposition to be well settled that, unless the articles of a company provide to the contrary, no meeting of a board is valid unless reasonable notice of it and the relevant agenda that is to be discussed at it is given to the directors.
>
> In *Young v Ladies Imperial Club Ltd* [1920] 2 KB 523; [1920] All ER Rep 223 is authority for that proposition. In that case, it was held that, 'where a special meeting of a committee or any other body has to be specially convened for a particular purpose, every member of that body ought to have notice of and a summons to the meeting, and accordingly the omission to summon one member of a committee and the fact that the notice did not state the object of the meeting with sufficient particularity vitiated the proceedings of that body' (per Abdoolcader J in *Public Prosecutor v Datuk Hj Harun bin Hj Idris & Ors* [1977] 1 MLJ 180 at p 189).

[26] The passage in *Aik Ming*'s case was also adopted in the case of *Lee Nyuk Heng & Anor v Pembangunan Ladang Hassan Sdn Bhd & Others* [2002] MLJU 684; [2003] 8 CLJ 237 where the court held:

> However, there appears to be support for the proposition that unless the object of the meeting is set out with sufficient particularity in the agenda, the notice of the meeting may not be valid and this can be found in the following passage in the Court of Appeal case of *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770; [1995] 3 CLJ 639 ...
>
> I would respectfully follow what the Court of Appeal had said in that case to conclude that the notice of the meeting was not sufficient to enable the matter of the appointment of a chairman to be the matter of a resolution as the matter merely

speaks of the fixing of a date for the holding of the AGM. I am prepared to go as far as to say it is highly arguable that the failure to state the matter of the proposal to appoint the fifth defendant as the chairman was deliberate as the surely such matter is far more important than the fixing of a date of meeting and since the fixing of a date of meeting deserves a specific reference, the matter of the proposal to appoint a chairman also deserves a specific mention. The fixing of a date for holding the AGM is a ruse intended to disarm the plaintiffs of their vigilance against the intention of the said defendants to appoint the fifth defendant as chairman and therefore to wrest control of the companies.

The notice of meeting was therefore invalid. Consequently, the appointment of the fifth defendant as the chairman and the removal of the first plaintiff as managing director, which are acts that flow from such invalid notice are themselves invalid as well (see *Aik Ming*'s case).

[27] On closer examination of the cases cited by learned counsel for the plaintiff, it will be immediately apparent that the comments made in those cases on the need for the notice to state with sufficient particularity on the object of the meeting in the agenda were mere obiter dicta and that the facts were distinguishable from our present case.

[28] In *Henderson v Bank of Australasia*, the court was dealing with the propriety or otherwise of the chairman of the extraordinary general meeting in rejecting the proposed amendment to a resolution that was properly put to the meeting. As regard the issue dealing with the sufficiency of the notice, there was in that case a specific clause which requires that the notice should specify the objects for holding the meeting. There is no such requirement in our present case.

[29] In *Primus (M) Sdn Bhd v EON Capital Bhd*, Anantham Kasinather J (as he then was) was dealing with the issue concerning the chairman's right to refuse a motion to adjourn the extraordinary general meeting and to remove him as chairman. The case of *Henderson v Bank of Australasia* was cited by the learned judge for the point relating to the chairman's wrongful refusal to put the motion to vote on an amendment to the resolution.

[30] In *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal*, the issue before the Court of Appeal was not on the sufficiency of the notice but the absence of the same. Accordingly, the comment by the Court of Appeal that ' ... unless the articles of a company provide to the contrary, no meeting of a board is valid, unless reasonable notice of it and the relevant agenda that is to be discussed at it is given to the directors ... ' is clearly obiter. In fact, the case relied upon for the aforesaid proposition, ie *Young v Ladies Imperial Club Ltd* [1920] 2 KB 523; [1920] All ER Rep 223 also does not deal with the sufficiency of notice but with the absence of notice.

[31] The case of *Lee Nyuk Heng & Anor v Pembangunan Ladang Hassan Sdn Bhd & Others* merits some discussion. In that case, a notice of meeting of the board of directors was issued to all directors where the agenda stated were as follows:

> PEMBANGUNAN LADANG HASSAN SDN BHD
>
> (020200-A)
>
> (Incorporated in Malaysia)
>
> NOTICE OF ANNUAL GENERAL MEETING
>
> NOTICE IS HEREBY GIVEN THAT the 2001 Annual General Meeting of the Company will be held at the Conference Room, Damai Plaza III, 3rd Floor, C11 North Wing, Jalan Damai, Kota Kinabalu on 23 November 2001 at 2.00pm, for the following purpose:
>
> 1. To receive and consider the accounts for the year ended 28th February 2001 and reports of the Directors and Auditors thereon.
> 2. To elect Directors
> 3. To appoint Messrs HORWATH TH LIEW TONG, formely known as TH Liew Tong & Gabungan as auditors of the Company and to authorise the directors to fix their remuneration.
>
> A member entitled to attend and vote at the meeting is entitled to appoint a proxy to attend and vote in his stead. A proxy need not be a matter of the Company.
>
> BY ORDER OF THE BOARD
>
> (NG NYUK KEONG)
>
> SECRETARY
>
> Sandakan
>
> Dated: 3-10-2001

[32] At the meeting of the board of directors, the fifth defendant was elected as the chairman of the board of directors. Thereafter and a few days later, a board of directors' meeting was held where the fifth defendant used a casting vote on the basis that he was the chairman to remove the first plaintiff as the managing director. This led the plaintiffs to complain that the notice of the board meeting was bad as it omitted to spell out in the agenda the proposal to appoint the fifth defendant as the chairman. According to the plaintiffs, it was because of the unimportant matter of the choosing of a date for the AGM stated in the agenda that had led them to decide not to attend the meeting scheduled.

[33] Ian Chin J held that the notice was not sufficient to enable the matter of the appointment of a chairman to be the matter of a resolution as the matter merely speaks of the fixing of a date for holding the AGM. The learned judge had relied on the passage in the Court of Appeal case of *Aik Ming (M) Sdn Bhd*

in reaching his decision. The learned judge also justifies his decision on the following ground:

> I would respectfully follow what the Court of Appeal had said in that case to conclude that the notice of the meeting was not sufficient to enable the matter of the appointment of a chairman to be the matter of a resolution as the matter merely speaks of the fixing of a date for the holding of the AGM. I am prepared to go as far to say it is highly arguable that the failure to state the matter of the proposal to appoint the fifth defendant as the chairman was deliberate as surely such matter is far more important than the fixing of a date of meeting and since the fixing of a date of meeting deserves a specific reference, the matter of the proposal to appoint a chairman also deserves a specific mention. The fixing of a date for holding the AGM is a ruse intended to disarm the plaintiffs of their vigilance against the intention of the said defendants to appoint the fifth defendant as chairman and therefore invalid. Consequently, the appointment of the fifth defendant as the chairman and the removal of the first plaintiff as managing director, which are acts that flow from such invalid notice are themselves invalid as well (see *Aik Ming*'s case).

[34] With respect, I am of the opinion that the requirement that the notice specifying the business to be transacted with some sufficiency is at best a matter of best practice but as a matter of law, it is not the case that the notice is required to state the matters or particulars of the business to be discussed at the meeting unless expressly required in the company's constitution.

[35] This proposition is stated in the English case of *La Compagnie de Mayville v Whitley* [1896] 1 Ch 788. The facts in that case are as follows. Certain resolutions were passed by two directors in a board of directors' meeting without notice of the said meeting being given to the plaintiff. Upon discovering the same, the plaintiff filed an action to prevent the directors from carrying out the resolutions. However, prior to the service of the writ, the two directors convened a board of directors' meeting, this time giving notice to the plaintiff but without stating the nature of the business to be transacted which the plaintiff did not attend. At this meeting, the impugned resolutions were moved and passed. The plaintiff challenged the validity of the meeting on the ground that the notice did not contain particulars as to the nature of the business to be transacted.

[36] Lindley LJ at p 797 of the judgment discussed the point dealing with the sufficiency of notice which he described as 'one question which is of great importance to companies' in the following words:

> This case involves one question which is of great importance to companies. The rest of the points are comparatively trifling. The great point is whether, when a directors' meeting is to be held, it is necessary to give a notice not only of the meeting, but of the business to be transacted at the meeting. I am not prepared to say as a matter of law that it is necessary. As a matter of prudence it is very often done, and it is a very wise thing to do it; but it strikes me, as it struck Lord Tenterden in *Rex v Pulsford*,

that there is an immense difference between meetings of shareholders or corporators and meetings of those whose business it is to attend to the transaction of the affairs of the company or corporation. It is not uncommon for directors conducting a company's business to meet on stated days without any previous notice being given either of the day or of what they are going to do. Being paid for their services — as they generally are, and as is the case in this company — it is their duty to go when there is any business to be done, and to attend to that business whatever it is; and I cannot now say for the first time that as a matter of law the business conducted at a directors' meeting is invalid if the directors have had no notice of the kind of business which is to come before them. Such a rule would be extremely embarrassing in the transaction of the business of companies.

Lord Tenterden had the very point before him in regard to municipal corporations in *Rex v Pulsford* I need not refer to the facts, but the point was taken there that a notice was not given of the business to be transacted at a meeting of the managing body. Lord Tenterden says: 'In *Rex v Hill* the election was by the body at large, which is a very different thing'. Then he goes on, a little lower down: 'The present is the case of an election by a select body, and we are of opinion that it was not necessary in the notice to them to state the purpose of the meeting. But although we are of that opinion in this case, we avoid giving any opinion as to an election by a corporate body at large. The difference between them is this: the select body are appointed to be aiding and assisting the mayor on all occasions concerning the city, when required so to do. It is, therefore, their duty to attend whenever the mayor gives them reasonable notice that their attendance is required; and we think they are not at liberty to say that they abstained from attending because they did not knew the specific purpose for which the meeting was about to be holden. If, indeed, it hud appeared to be usual in this borough to give a more precise notice, the case would have been very different; but nothing of that kind is suggested'. He decided, therefore, that the notice, though not stating the object of the meeting, was sufficient. The only other case, so far as I know, in which this point has ever been brought forward or considered, is the case of *In re Homer District Consolidated Gold Mines*. The judgment of North J in that case no doubt contains a passage which goes to shew that he thought it was at all events an important point that the purpose for which the directors' meeting there was called was not stated; but when the case is examined you find that, whatever may be said about the necessity for the giving of any such notice, the decision is absolutely right. The case was this: Some shares had been applied for, and at a board meeting it was resolved that no allotment should be made until at least 14,000 preference shares should have been applied for by approved applicants. Some time after this, some applications for shares having been made, two directors held a meeting with very short notice, the notices for a meeting at 2 PM not being posted till 11 AM on the same day — a meeting held very irregularly in many respects — at which they rescind that resolution and proceed to allot shares. The persons to whom those shares are allotted come and say, 'It is a trick, and we require that allotment to be cancelled'; and it was cancelled accordingly. It was an attempt to capture shareholders — a trick which no judge could possibly countenance. In the course of dealing with that trick, North J says, amongst other things, 'What is more, it' (that is, the notice convening the meeting of the board) 'was expressed in such a way (I cannot help thinking intentionally so expressed) as not to give Witt and Simpson notice of what was to be done. On that

notice at two o'clock, the two directors present knowing that one of the other two summoned could not be present till three, and not knowing whether the other could come, proceeded at once to rescind a resolution passed by the board two weeks before. In my opinion that was about as irregular as anything could be'. That the notice did not mention the business is only treated as one of the circumstances unfavourable to the validity of the resolutions, and we are asked to say now, for the first time as a matter of law, that a notice to the directors of a directors' meeting must state what the business is if it is anything more than routine business. If we did so, I think we should not be laying down sound law. Such a rule is not required for the honest transaction of business, and would be most disastrous.

[37] The proposition of law by Lindley J in *La Compagnie de Mayville v Whitley* has been adopted with approval by the Supreme Court of Queensland, Australia in *Eastern Resources of Australia Ltd v Glass Reinforced Products (GRP) Pty Ltd & Ors* (1986) 10 ACLR 496 where Connolly J in his dicta dealing with the issue of the validity of an adjourned directors' meeting commented as follow:

The relevant law may be summarized as follows. Prima Facie, due notice must be given convening a meeting of directors, and in default thereof the meeting is irregular: *Palmer, Company Law* 22nd ed, vol 1, para 60–03; *Halsbury's Laws of England* 4th ed, vol 12, para 528. At meetings of directors the proceedings are governed by the company's articles and by any rules made by the directors themselves by virtue of the powers given them by the articles: Palmer *op cit* para 60–02. Articles 83(a) provides as has been seen that the directors may meet together for the despatch of business, adjourn and otherwise regulate their meetings as they think fit. This is a typical provision.

Next it must be accepted that there is not any general requirement that the business to be concluded at a meeting of directors be specified in the notice calling the meeting: Palmer *op cit* para 60–03. In *Halsbury loc cit* para 529 it is said that their properly convened meetings, directors may transact all business within their powers though no notice has been given to the members of the board that any special business is to be transacted. The authority given in both works for this proposition is *La Compagnie de Mayville v Whitley* [1896] 1 Ch 788.

[38] This proposition of law has in fact been followed by Zakaria Yatim J (as he then was) in *Dr Mahesan & Ors v Ponnusamy & Ors* [1994] 3 MLJ 312. In that case, an application was made, inter alia, to declare a notice of board of directors' meeting and all proceedings and minutes of the board of directors' meeting that was held pursuant to the said notice to be null and void on the ground that there was insufficient time given to the plaintiff to attend the meeting and that the plaintiff's request for particulars of the allegations against him was not provided to him respectively.

[39] In dealing with the requirement of giving particulars of the allegations to be discussed at the meeting, His Lordship Zakaria Yatim J held as follows:

A Now I turn to Dr Mahesan's request for particulars regarding the allegations. In the notice quoted above, an agenda of the meeting is also included. In my opinion an agenda of the business to be transacted as the meeting is not required in law to be given. In *Eastern Resources of Australia Ltd v Glass Reinforced Products (GRP) Pty Ltd & Ors* (1986) 10 ACLR 496, Connolly J said a p 500 that; there is not any general
B requirement that the business to be conducted at a meeting of directors be specified in the notice calling the meeting ... . In *La Compagnie* [1896] 1 Ch 788, Lindley LJ at p 797 said:

> The great point is whether, when a directors' meeting is to be held, it is necessary to give a notice not only of the meeting, but of the business to be transacted at the
C meeting, I am not prepared to say as a matter of law that it is necessary ... I cannot now say ... that as a matter of law the business conducted at a directors' meeting is invalid if the directors have had no notice of the kind of business which is to come before them.

D Since in law, the business to be transacted at the meeting of directors is not required to be included in the notice, it is therefore not the requirement of the law that the agenda be included in the said notice. In the circumstances Dr Mahesan has no reason to complain that he did not have the particulars of the allegations since the secretary was not obliged to provide particulars in the notice.

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[40] In my judgment, the legal position that an agenda is not strictly required to be given in the notice of the board of directors' meeting is rooted in practicality. It is not uncommon for board of directors' meeting to be held on an urgent basis and on very short notice to deal with various business
F exigencies. Under such circumstances, it may not always be possible for an agenda to be prepared and circulated before such meetings. Further, it is often the case that the board of directors during deliberation of the matters listed for discussion at the meeting, to proceed to also decide and resolve on other matters arising from the discussion which are never stated in the agenda for the
G meeting. The business of the board of directors will be impossible if such resolutions are invalid only because such matters were not stated in the agenda for the meeting.

[41] Further, what may be considered as of sufficient importance to merit
H the matter to be listed in the agenda is subjective and can easily give rise to disagreements among the directors. If the law requires that directors must be notified of 'important' matters to be discussed at the board of directors' meeting, this will potentially give rise to proliferation of litigations centre on the omission or inclusion of matters in the agenda. This will only lead to
I frequent disruptions to board of directors' meeting.

[42] A common argument proffered that sufficient notice specifying the business to be done or object of the meeting ought to be included is that this would enable the directors to decide whether to attend or to be better prepared

when attending the board meeting. This is to avoid any unexpected or surprise discussions and resolutions raised at the meeting. Indeed, these were the facts of the case in *Lee Nyuk Heng & Anor* cited above.

[43] With respect to such argument, I would say that it is incumbent on each director to attend the board of directors' meeting and to be prepared for any discussions raised during the meeting. If there is indeed any 'surprise' or 'unexpected' matters that are raised during the meeting, it is for the board of directors to deliberate and to decide on how they wish to deal with such matters, including, if necessary, adjourning the matters for further deliberation to another date. A director who either fails to attend a meeting or is ill-prepared to discuss matters raised at a meeting must necessarily accept the outcome of the decisions made by the majority of the directors at the meeting.

[44] For the avoidance of doubts, it is certainly not the case that because there is no legal requirement for the notice to include an agenda of the matters to be discussed at the meeting, that such agenda for the meeting should be dispensed with. In fact, it is pertinent to note that para 4 of the Third Schedule of the Companies Act 2016 ('the CA 2016') provides that a notice of a meeting of the board shall, among others, *include the matters to be discussed*. Although the company is at liberty not to adopt the Third Schedule or any of the rules therein, it nevertheless reflect the legislative's intent that such practice should be the default provision whenever the Third Schedule is adopted.

[45] In the present case, the constitution of the first defendant does not mandate that the notice of directors' meeting shall include the matters to be discussed. Accordingly, the common law position as enunciated in *Dr Mahesan & Ors*, applying *La Compagnie de Mayville* is applicable.

[46] Accordingly, both questions 1 and 2 are answered in the affirmative.

QUESTIONS 3 AND 4

[47] Article 91 of the constitution reads as follows:

> Every Director who is interested directly or indirectly in any contract or arrangement or proposed contract or arrangement with the company shall declare his interest to the Board of Directors as soon as he becomes aware of such contract or arrangement. Such Directors shall not participate in deliberations concerning such contract or arrangement nor shall he cast his vote in regard t any contract or proposed contract or arrangement in which he has, directly or indirectly, an interest.

[48] It is the plaintiff's contention that there was non-participation by the plaintiff as a director to deliberate and vote on the termination of her contract of service as managing director and the termination of Indraa as the COO at

A the board meeting. By reason of the aforesaid, the plaintiff contended that the resolutions passed at the meeting are invalid.

[49] More particularly, learned counsel for the plaintiff contended that there was in fact no deliberation and or formal voting process that had taken place during the meeting pertaining to the termination of her contract of service. All that had happened was an announcement by the Chairman of the board of directors that she had the mandate of the majority shareholders to terminate the plaintiff's contract of service and there was no objection by the directors attending the meeting.

[50] In my judgment, it is not necessary that there must be deliberation of the subject matter by the board of directors before a resolution relating to the matter can be validly carried through. There is also no necessity for a formal voting process to take place before a resolution is validly carried through.

[51] Suffice it to say that in this case, when the Chairman of the board of directors had made the announcement that she had the mandate of the substantial shareholders of the company to terminate the plaintiff's contract of service as the managing director, none of the directors at the meeting had raised any objection to the same or even requested that the matter be deliberated upon by the board. The natural inference must be that the board of directors was in unanimity in the decision. Further, when the minutes of the board of directors' meeting was subsequently drawn up where the resolution was recorded as having been carried through, there was no objection taken by any of the directors that no such resolution was in fact resolved at the meeting.

[52] I also agree with learned counsel for the defendants that the plaintiff has a direct interest pertaining to the termination of her contract of service as managing director and by reason of article 91 was precluded from participating in the deliberations and the voting on the same in any event.

[53] The plaintiff further contended that the resolution relating to the termination of Indraa's contract of service as the COO is also invalid because she had not participated in the deliberation of the matter as she had left the meeting not knowing that the COO's contract of service would be discussed.

[54] With respect, the plaintiff had taken the decision to walk out of the meeting when the matter relating to the termination of her contract of service was raised by the Chairman. The plaintiff cannot now complained that the resolution pertaining to Indraa's contract of service is invalid because of her non-participation, which was a result from her own doing. It also does not lie in her mouth for the plaintiff to contend that she was not aware that Indraa's contract of service would be discussed after she left the meeting. As I have held

above, there is no legal requirement that the notice of the meeting must contain an agenda, let alone, an agenda that expressly states that the termination of Indraa's contract of service would be discussed at the meeting. When the plaintiff opted to walk out of the meeting, she did so at her own perils and cannot be permitted to challenge any resolutions that may be proposed and passed after she left.

[55] For the reasons above, questions 3 and 4 are also answered in the positive.

QUESTIONS 5 AND 6

[56] The reliefs sought by the plaintiff for reinstatement of her position as the managing director of the company and for Indraa to be reinstated as the COO of the first defendant is premised upon the validity of the notice, the BOD meeting and the resolutions carried thereto.

[57] In seeking the declaration for re-instatement, the plaintiff is not seeking the remedy of reinstatement based on a wrongful dismissal of her employment under her contract of service. Neither is the plaintiff claiming on behalf of Indraa for wrongful dismissal of his employment under his contract of service as the COO of the first defendant.

[58] In my mind, the plaintiff is entitled to claim that in the event the notice and or the BOD meeting and or the resolutions thereto are found to be invalid and or declared to be null and void, the consequences flowing from the same must necessarily mean that both the plaintiff and Indraa would be re-instated as the managing director and the COO of the first defendant respectively.

[59] In this regard, I am in agreement with learned counsel for the plaintiff that the declarations for the re-instatements have nothing to do with the claims for wrongful dismissal which are more appropriately pursued in the Industrial Court under the Industrial Relations Act 1967.

[60] I also agree with learned counsel for the plaintiff that for the same reasons, only the plaintiff and not Indraa who has the necessary locus standi to seek for the declaration that Indraa be re-instated as the COO of the first defendant on the basis that the notice, BOD meeting and the resolutions are invalid.

[61] For the above reasons, questions 5 and 6 are answered in negative and affirmative respectively.

A CONCLUSIONS

[62] As a consequence of my decisions in respect of the questions 1 to 6 above, I hereby dismissed the plaintiff's action herein against the defendants with costs fixed at RM20,000 subject to payment of the usual allocator.

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Plaintiff's claim dismissed with costs of RM20,000 subject to allocator.

Reported by Mohd Kamarul Anwar

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